IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 617 of 1993
with
Criminal Appeals Nos.624/93, 625/93 and 626/93

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?No

2. To be referred to the Reporter or not? No

3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

STATE OF GUJARAT

Versus

SAHJANAND GIPSUM SUPPLIERS

Appearance:
Mr. K.P. Rawal, APP, for the appellant, in all the four appeals.
Mr. Akshaya H. Mehta for respondent No.2 in Criminal Appeal No.617/93;
Mr.R.C. Kakkad for respondent No.3 and 4 in Criminal Appeal No.624 of 1993
Mr.J.G. Shah for respondents in Criminal Appeal No.626 of 1993
Respondents in Criminal Appeal No.625 of 1993 are served.

CORAM : MR.JUSTICE M.H.KADRI
Date of decision: 13/02/98

COMMON ORAL JUDGMENT

By means of filing this group of four appeals under Section 378 of the Code of Criminal Procedure, 1973, ('Code' for short), the State of Gujarat has questioned correctness and legality of the judgment and orders dated March 10, 1993, rendered by the learned Additional Sessions Judge, Bhavnagar, in Criminal cases Nos. 2/87, 5/87, 7/87 and 10/87, acquitting the respondents of the offences punishable under Section 7 of the Essential Commodities Act ('Act' for short), for the breach of clause 13 of the Fertilizer (Control) Order, 1957 ('Order' for short). The learned Additional Sessions Judge acquitted the respondents on the ground that the complaints lodged by the Agricultural Inspector, Gadhda, District Bhavnagar, were beyond the period of limitation as prescribed under Section 468(2) of the Code.

As the common question of law and facts are involved in this group of appeals, they are disposed of by the common judgment.

Criminal Appeal No.617 of 1993

The facts, briefly, stated are that the Agricultural Inspector had collected samples of the fertilizer on July 25, 1983. As per the provisions of the Order, he had sent the samples for analysis to the Laboratory, at Junagadh. As per the report of the Laboratory, the fertilizer was found to be sub-standard and, therefore, the Agricultural Inspector lodged a complaint in the court of the learned Additional Sessions Judge, Bhavnagar, on January 12, 1987, which came to be registered as Criminal case No.2 of 1987.

Criminal Appeal No.624 of 1993

The facts, briefly, stated are that the Agricultural Inspector had collected samples of the fertilizer on January 17, 1985. As per the provisions of the Order, he had sent the samples for analysis to the Laboratory, at Junagadh. As per the report of the Laboratory, the fertilizer was found to be sub-standard and, therefore, the Agricultural Inspector lodged a complaint in the court of the learned Additional Sessions Judge, Bhavnagar, on April 16, 1987, which came to be registered as Criminal case No.5 of 1987.

Criminal Appeal No.625 of 1993

The facts, briefly, stated are that the Agricultural Inspector had collected samples of the

fertilizer on November 15, 1984. As per the provisions of the Order, he had sent the samples for analysis to the Laboratory, at Junagadh. As per the report of the Laboratory, the fertilizer was found to be sub-standard and, therefore, the Agricultural Inspector lodged a complaint in the court of the learned Additional Sessions Judge, Bhavnagar, on May 1, 1987, which came to be registered as Criminal case No.10 of 1987.

Criminal Appeal No.627 of 1993

The facts, briefly, stated are that the Agricultural Inspector had collected samples of the fertilizer on February 18,1985. As per the provisions of the Order, he had sent the samples for analysis to the Laboratory, at Junagadh. As per the report of the Laboratory, the fertilizer was found to be sub-standard and, therefore, the Agricultural Inspector has lodged a complaint in the court of the learned Additional Sessions Judge, Bhavnagar, on April 16, 1987, which came to be registered as Criminal case No.7 of 1987.

All the above accused were tried separately by the learned Additional Sessions Judge. In all the Criminal Cases, the respondents filed applications for dropping of proceedings, as the complaints were barred by limitation as per the provisions of Section 468(2) of the Code. The learned Additional Sessions Judge, by his judgment and orders dated March 10, 1993, passed below the applications for discharge, in the Criminal Cases abovementioned, acquitted the respondents from the charges levelled against them, on the ground that the complaints were barred by limitation as per the provisions of Section 468(2) of the Code.

Mr. Rawal, learned Additional Public Prosecutor, has argued that the learned Judge has erred in not appreciating that, as per Section 7(1)(ii) of the Act, the maximum punishment prescribed is seven years and, therefore, the provisions of Section 468(2) of the Code will not be applicable. The learned APP, in support of his submission, has placed reliance on the decision of this Court (Coram: N.J. Pandya, J.), rendered in Criminal Revision Application No.201 of 1997, in the matter of State of Gujarat vs. Krushnakant Bhagubhai Patel, decided on September 19, 1997. In the case of Krushnakant Bhagubhai Patel (supra), the Court considered the following points:

1. What is the effect of Sec.12AA in the Essential Commodities Act, 1955 on the aspect of limitation as prescribed in Sec.468 of the Cr.P.C.?

2. When Parliament devises a particular procedure namely that of a summary trial and in the process also, without amending Sec.7 reduces the maximum punishment that could be awarded in the trial by the summary procedure to that of 2 years as against the maximum punishment of 7 years in Sec.7, which of the two provisions as to the punishment will hold the field when question of limitation of Sec.468 is to be considered?

3. If summary trial as per Sec.12AA is prescribed for a speedy trial leading to the maximum imprisonment for 2 years at the end thereof and when during the time Sec.12AA remains in force, no one could ever be awarded the maximum sentence of 7 years. How would the question of limitation be decided?

4. Keeping in mind the object of speedy trial when Sec.12AA is introduced and at the same time punishment of 7 years is effectively reduced to 2 years imprisonment, the right to claim statute of limitation given to the accused under Sec.468, whether interpretation should be in furtherance of that right given to the accused or should be denied to him with reference to Sec.7 of the Act?

5. Whether amendment by way of Sec.12AA has effect of either deleting during its tenure the penal provisions contained in Sec.7 or making substantial changes therein?

The Court, while deciding the above points, made the following observations:

" A close look at Sec.468 of the Cr.P.C. would be enough. To apply the provision of Sec.468, in my opinion, what is to be looked at is the penal provision of a given statute which makes a certain act to be an offence. In the instant case, under the control order, it is a penal offence to misbrand a product. If that is the offence alleged, it could be penalised only under Sec.7 of the said Act. The offence punishable, as contemplated by sec,468 therefore, is the one which is to be penalised under Sec.7. The offence is not made punishable under Sec.12AA.

1. Once the quantum of punishment of a given offence is understood in the light of the penal provision of the Statute namely Sec.7 of the Act, in the aforesaid manner, it becomes at once clear that what Sec.12AA does is only to prescribe a ceiling upto which cases tried summarily could be punished. Reduction in the quantum of sentence thus brought about is the direct result of application of summary procedure. Once the summary procedure is taken away, the ceiling too will go away. In either event, whether ceiling is there or not the punishment would be under Sec.7 of the Act and not under Sec.12AA.

2. Section 12AA thus prescribes merely a procedure and it is wrong to read the said ceiling of 2 years as a provision for punishment in substance. The substantial provision as to punishment is to be found in Sec.7 alone, but for which, there could not no order of conviction and sentence.

3. Sec.12AA thus being purely a procedural amendment, the ceiling as to punishment prescribed therein cannot be said to be either deleting the maximum punishment prescribed in Sec.7, nor could it be said to suspend or keep in abeyance the provision of Sec.7 of the Act.

4. In my opinion, what Section 12AA does is that when the accused is tried summarily, the maximum punishment that can be awarded to him is 2 years though the offence is one where the punishment could be upto 7 yeas as per Sec.7 of the Act. But for the restrictions imposed because of the summary trial, the learned Judge could have awarded the sentence of imprisonment upto 7 years. It is the summary trial which brings about the ceiling of 2 years as that affords a built in protection to the accused, who is tried summarily that if at all he is convicted by summary trial, the sentence cannot be that of more than 2 years. The relevant provision for considering the question of applicability of the provision of Limitation in Cr.P.C. would therefore, be Sec.7 and not Sec.12AA. So far as point No.1 is concerned, Sec.12AA will not have the effect of attracting Sec.468 Cr.P.C. So far as point No.2 is concerned, it is Sec.7 which will hold the field when question of limitation under Sec.468 is there. So far as point no.3 is concerned, the question of limitation will be decided with reference to Sec.7. Coming to point no.4, as the question of limitation is to be decided with reference to Sec.7, there is no question of the accused having a right to claim statute of limitation under

Sec.468 Cr.P.C. Amendment by way of Section 12AA does not have the effect of either deleting during its tenure the penal provision contained in Sec.7 or making substantial changes therein. Point no.5 is answered accordingly.

5. L.A. Shri Raju had cited various authorities in support of his contentions. He has relied on mainly 1993 (3) SCC 288 where these very provisions of Essential Commodities Act namely 12AA, 12A, 12AC and 7(1((a)(ii) were under consideration in relation to Sec.167(5) of the Cr.P.C.

6. According to Sec.7 of the Act, it will be a warrant triable case. However Sec. 12A or 12AA brings in summary procedure and therefore, Secs.262 to 265 of the Code will be applicable. This, in turn, according to the learned Judges will have the effect of making it a summons case within Sec.2(w) of the Code and Sec.167(5) will stand attracted. This would have the meaning of imposing a limit of six months for filing chargesheet.

7. However, it is required to be appreciated that 167(5) itself is a part of procedural aspect and will be regulated by the fact whether it is a warrant triable case or summons triable case. Application of summary procedure makes it a summons triable case without any doubt. However, to an extent, this reasoning for the purpose of considering the applicability of Sec.468, in my opinion is not permissible.

8. Procedure is one thing and provision like statute of limitation baring remedy is altogether a different thing. There might be restriction or reduction in powers of the Court to punish. That would not mean that the offence ceases to be punishable under the main penal provision. One can take the example of a case punishable for more than 3 years being tried by a Judicial Magistrate First Class, who cannot impose a sentence for more than 3 yeas. No doubt, Shri Raju was ready with this situation and pointed out that in such eventuality as of a Magistrate not empowered, there is provision for him to make reference under Sec.325 Cr.P.C. As long as Section 12AA is in force, this course is not open to the learned Special Judge.

9. It is not a case where the Judge or a Magistrate trying the case is faced with a situation where he finds that the accused deserves a punishment more than what he is empowered to impose. It is a case where for application of statute of limitation as per Sec.468, the

penal provision is required to be looked at which is definitely Sec.7 and not Sec.12AA. In my opinion, therefore, this controversy is without any substance. It has no parallel witch in the said aspect of procedural nature considered by the Supreme Court in the case under discussion.

10. Shri Trivedi, the learned APP has relied on 3 decisions reported in 1989 (2) FAC 182, 1989 CR.L.J. NOC 88, 1990 Cr.L.J.1885 Allahabad where the view which I am taking has been taken. Shri Raju has answered to the aforesaid decisions and he has relied upon certain other decisions namely 92(1) EFT 219 and 92(2) EFT 528. The common feature of both these sets of authorities is that, the respective learned Judges were considering the question whether Sec.167(5) Cr.P.C. would apply or not. In that connection, one view is that the word "punishable" used in Criminal Procedure Code in relation to summons case and warrant case in face of Sec.12AA of the Act will have no meaning because Sec.12AA in terms provide for summary trial. The moment trial is prescribed to be summary, the consequence thereof, as prescribed in Criminal Procedure Code will follow. Once this is established with reference to Sec.7 of the Essential Commodities Act, it cannot be said that the sentence punishable though procedure is that of summary trial for 167(5) Cr.P.C. purpose, is under a warrant triable case.

11. Otherwise also, a case which is prescribed to be tried in a summary way, as understood in Criminal Procedure Code, would cease to be a warrant triable case by very definition. Sec. 7 of the Act, therefore, cannot be resorted to. At the same time, it must be appreciated that in face of 1993 (3) SCC 288, differences of opinion between the High Courts have come to rest because the Hon'ble Supreme Court has held, as stated above that Sc.167(5) Cr.P.C. would apply to cases tried under Sec.12AA. However, the learned Judges have also stated in the said Supreme Court Judgment that the learned Special Judge trying the matter can order investigation under that very provision of Cr.P.C. Virtually, therefore, the applicability of Sec.167(5) ceases to have any importance for an accused proposed to be tried for an offence under the Act though Sec.167(5) does apply to the summary trial. The said Supreme Court decision comes to a conclusion where at the end of six months of investigation it will stop if no charge sheet is filed and no orders are obtained from the learned special Judge. Even after the stoppage the learned special Judge can order further investigation.

12. Essentially, therefore, what has been done in relation to the controversy as to applicability of Sec.167(5) is that it forms part of the procedure. In my opinion, whether the question being considered by the Courts is procedural or substantial can be tested by raising the following questions.

1. How the matter is to be tried?

2. Whether the matter can be tried?

First of the two would necessarily result into an answer tothe procedure which in face of Sec.12AA would be a summary procedure. The second question would immediately take us into the realm of substantial law, that is, where provisions like law of limitation in form of Sec,468 Cr.P.C. would come in. If it applies, the trial itself could not commence and therefore, the accused could not be tried. The question of how he is to be tried arises, provided, he is to be tried.

13. The State has raised the aforesaid substantial question by way of this Revision Application and in my opinion, Sec.12AA will have no bearing on it. With reference to Sec.468 Cr.P.C. it will have to be answered in favour of the State because, inspite of Sec.12AA, the offence does remain punishable under Sec.7. The punishment prescribed therein is extending upto 7 years. Limitation under Sec.468 therefore does not apply."

I am in entire agreement with the proposition of law laid down by the Court in Criminal Revision Application No.201 of 1997 in Krushnakant Bhagubhai Patel (supra), that, in spite of introduction of Section 12AA, offence under the Act still remains punishable under Section 7 of the Act and, therefore, limitation prescribed under Section 468 will not be applicable.

However, learned counsel appearing for the respondents, has invited my attention to the decision of this Court (Coram: V.H. Bhairavia, J.) in Criminal Revision Application No.410 of 1989, decided on October 11, 1990. In that case, the Court has held that maximum punishment for breach of the Rules, which were framed under Section 3(2) clauses (h)(i) of the Act, was one year and, therefore, as the complaint was not lodged within the period of one year, it was barred by the period of limitation. In my opinion, the judgment rendered by this Court in Criminal Revision Application

No.410 of 1989 will not be applicable to the facts of the present cases. In the present cases, the respondents were prosecuted for manufacturing and selling sub-standard fertilizers, which will not fall within the breach of clauses (h) and (i) of Section 3 of the Act, and the breaches committed by the respondents of clause 13 of the Order would be punishable under Section 7(1)(ii) of the Act, which prescribes maximum punishment of seven years. If the penal provision prescribes maximum punishment of seven years, then the period of limitation would not be applicable as per Section 468 of the Code. In view of this settled legal position, following the decision of this Court in Criminal Revision Application No.201 of 1997 in Krushnakant Bhagubhai Patel (supra) , these appeals are required to be allowed.

The learned counsel for the respondent has, further, submitted that Criminal Cases were filed in the years 1985 and 1987 and, therefore, because of long lapse of time, it would cause embarrassment to the respondents, if the Criminal cases are remanded to the learned Additional Sessions Judge for trial in accordance with law. The submission of the learned counsel for the respondents is devoid of any merits. In the case of State of U.P. vs. Hanif, reported in (1992) 3 Supreme Court Cases 100, an argument was advanced before the Supreme Court that the sale of adulterated milk was on December 3, 1978 and that the long lapse of time is a cause to take a lenient view in the matter. The Supreme Court negatived that contention observing that, when minimum sentence of six months and fine was prescribed under Section 16 of the Prevention of Food Adulteration Act, 1954, there was no question of taking lenient view on ground of long lapse of time. In the case of Phoolan Devi vs. State of M.P. reported in (1996) 11 Supreme Court Cases 19, the Supreme Court held that long continuation of prosecution/trial by itself is not enough to quash the same. It has to be ascertained in each case as a question of fact whether the State alone or the accused also is responsible for the delay in completion of trial. Looking to the facts of the present case, the respondents had filed applications for dropping proceedings and the learned Sessions Judge had upheld his contention and discharged them on the ground that the complaints were barred by the period of limitation as prescribed under Section 468(2) of the Code. Looking to the facts of the present case, it cannot be said that the prosecution was responsible for causing delay. It is true that the respondents shall have to face the trial

after gap of twelve years, but that alone cannot be a ground for not remanding the cases. The respondents have committed offence under the Essential Commodities Act, which was enacted in the interest of the general public for the control of production, supply and distribution of essential commodities. The object of the Act is to ensure production and equivitable distribution of essential commodities in larger public interest. The respondents were found to have been manufacturing and selling sub-standard fertilizer which was to be used in cultivation of food-grains. If the fertilizer is sub-standard, then it would badly affect cultivation and production of food-grains. Therefore, offence under the Act is a serious offence, which cannot be viewed lightly looking to the object of the Act. In the case of Common Cause, a Registered Society v. Union of India, reported in AIR 1996 Supreme Court 1619, the Supreme Court gave directions in respect of cases pending in criminal courts for long period in view of the fact that the very pendency of criminal proceedings for long period by itself operates as an engine of oppression. The Supreme Court, while issuing direction to the subordinate courts, in paragraph 4, at page 1621, held that the directions shall not apply to cases of offences involving Essential Commodities Act, Food Adulteration Act, etc. The fact that cases of offences involving Essential Commodities Act, pending in criminal courts for long period, were excluded from the directions given by the Supreme Court, shows that the offences punishable under the provisions of Essential Commodities Act being grave in nature should be viewed seriously. Therefore, the argument of the learned advocates for the respondents that, because of long lapse of time, the respondents should be discharged, is devoid of any merit.

In the result, these appeals are allowed. The judgment and orders dated March 10, 1992, rendered by the learned Additional Sessions Judge, Bhavnagar, in Criminal cases Nos. 2/87, 5/87, 7/87 and 10/87, are quashed and set aside. The Criminal Cases are remanded to the learned Additional Sessions Judge, Bhavnagar, for trial in accordance with law. The Trial Court is directed to dispose of the said Criminal cases as expeditiously as possible.

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(swamy)